

LEADING ^{THE} CHARGE

54th Annual Human
Resources Conference & Expo



ACCOMMODATING MENTAL IMPAIRMENTS UNDER THE ADA

Jennifer Rulon & Tessa Castner
Frost Brown Todd LLC

Agenda

- I. Americans with Disabilities Act (“ADA”) Refresher
- II. Application of the ADA to Mental Impairments
- III. Hypotheticals
- IV. Best Practices

LEADING ^{THE} CHARGE



ADA REFRESHER

LEADING THE CHARGE



Who is protected?

Person who has a physical or mental
impairment that substantially limits one
or more major life activities

or

major bodily functions

LEADING THE CHARGE



What is a disability?

Can meet the definition in three ways:

1. a physical or mental impairment that substantially limits one or more major life activities of such individual;
2. a record of such impairment; or
3. being regarded as having such an impairment.

LEADING THE CHARGE



Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working

* not an exhaustive list

LEADING THE CHARGE



Major Bodily Functions

- Functions of the immune system
- Normal cell growth
- Functions of the following systems
 - Digestive
 - Bowel
 - Bladder
 - Neurological
 - Brain
 - Respiratory
 - Circulatory
 - Endocrine
 - Reproductive

* not an exhaustive list

LEADING THE CHARGE



“Regarded As” Disabled

- An actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity
- Not including impairments that are transitory or minor (actual or expected duration of 6 months or less)

LEADING THE CHARGE



When can an employer ask medical questions?

1. When an employee asks for a reasonable accommodation
2. After a job offer, but before employment begins, as long as everyone in the same job category is asked the same questions
3. When engaging in affirmative action for people with disabilities, if response is optional
4. When there is objective evidence an employee may be unable to do the job or that the employee poses a safety risk because of a condition

LEADING THE CHARGE



What is a reasonable accommodation?

Adjustment(s) or modification(s) to the way things are done at work to enable an individual to do a job, apply for a job, or enjoy equal access

LEADING THE CHARGE



Reasonable Accommodation

- Generally, individual must ask for one
- No special words
- Request need not be made in writing
 - Can be oral initially
 - Can ask (not require) to complete a form

LEADING THE CHARGE



Discrimination Prohibited

- Employers cannot discriminate against qualified individuals
- The applicant or employee must be qualified for the job sought
 - meet job-related requirements (education, training, skills)
 - must be able to perform the job's essential functions with or without a reasonable accommodation

LEADING THE CHARGE



Discrimination Prohibited

Employers cannot discriminate against qualified individuals on the basis of a disability with regard to:

- Hiring
- Advancement
- Discharge
- Employee compensation
- Job training

* not an exhaustive list

LEADING THE CHARGE



APPLICATION OF THE ADA TO MENTAL HEALTH IMPAIRMENTS

LEADING THE CHARGE



What is a mental impairment?

Any mental or psychological disorder,
such as emotional or mental illness

LEADING THE CHARGE



HSM2

Mental Impairments as Disabilities

A mental impairment is not automatically a disability

- To rise to the level of a “disability” the mental impairment must “substantially limit” one or more major life activities
- Substantial limitation is measured by the severity of the limitation and the length of time it restricts the major life activity
- Analysis must be individualized, not based on generalizations about the impairment

LEADING THE CHARGE



Slide 16

HSM2 Heaton, Shannon M., 4/18/2018

Behaviors / Traits Are Not Mental Impairments

Stress (irritability, chronic lateness, poor judgment, etc.) alone is not a mental impairment.

BUT

Stress (or any of the other traits) may be related to or a symptom of a mental or physical impairment.

LEADING THE CHARGE



Examples of Mental Impairments That *May* Qualify as Disabilities

- Major depression
- Bipolar disorder
- Anxiety disorder
- Panic disorder
- OCD
- PTSD
- Schizophrenia
- Personality disorders

Note: This is not an exhaustive list, but not all conditions listed in the DSM-IV are disabilities, or even impairments for the purposes of the ADA.

LEADING THE CHARGE



Exceptions to the Definition of Disability

- Transvestitism
- Transsexualism
- Exhibitionism
- Voyeurism
- Gender identity disorders not resulting from physical impairments
- Other sexual behavior
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from current illegal use of drugs
- Homosexuality
- Bisexuality

LEADING THE CHARGE



Addiction & Drug Use

Not Covered by the ADA

Individuals currently engaging in the use of illegal drugs

Potentially Covered by the ADA

- Individuals not currently engaging in the illegal use of drugs who are participating in, or have successfully completed a drug rehabilitation program
- Individuals erroneously regarded as engaging in the illegal use of drugs

LEADING THE CHARGE



Dangerous Employees

- An employer may lawfully exclude an individual from employment and need not accommodate the person if the person poses a “direct threat”
- Direct threat – a person who poses a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation
- Must be based on an individualized assessment
- Must identify a behavior that poses a direct threat
 - Cannot be a direct threat by virtue of having a psychiatric disability

LEADING THE CHARGE



Examples of Reasonable Accommodations

- Modifying work schedules
- Room dividers to help concentrate
- Tape recording information that may be difficult to remember
- Providing a job coach to assist in training
- Allowing food or drink despite policy otherwise prohibiting

* not an exhaustive list – be creative!

LEADING THE CHARGE



HYPOTHETICALS

LEADING THE CHARGE



Hypothetical A – Part 1

- Abbey sends an angry email to her supervisor outlining complaints that she has with his management. She also states in the email, “I am also too sensitive because I have suffered deep depression since I was 12 and it is a disability I cannot help.”
- The supervisor calls HR. How would you respond?

LEADING THE CHARGE



Hypothetical A – Part 2

- The supervisor does not involve HR after Abbey sends the email.
- Instead, the next day, Abbey is called in for a meeting to receive a written warning for the email. Abbey responds by yelling, reiterating that she has depression, and storming out of the meeting.
- Now, the supervisor calls HR. What do you do?

LEADING THE CHARGE



Hypothetical B

- George directly supervises ten employees. He tells HR that he suffers from depression and would like to work remotely for half of the week so that he can more easily drive to his psychologist's office for treatment.
- What questions should we ask?

LEADING THE CHARGE



Hypothetical C

- Brad suffers from PTSD after service in the army. After his supervisor has a coaching session with him, Brad tells a coworker that he is “mad enough to kill” his supervisor.
- Brad asks another coworker, “What is my supervisor trying to do, make me hurt her or something?”
- Both coworkers report these comments to HR and also tell HR that they know Brad has PTSD. Response?

LEADING THE CHARGE



Hypothetical D

- Amanda is employed in an office setting. Her manager frequently drops by her office unannounced and demands detailed status updates on projects. Amanda struggles with providing these updates. One day, she has a panic attack after her manager asks her for one.
- Amanda comes to HR and tells you that she suffers from anxiety. Amanda feels that her manager is “interrogating” her during these updates. She wonders if it is possible for her to provide status updates in a different manner.

LEADING THE CHARGE



Hypothetical E

- Julio is employed at a manufacturing facility with lots of loud noises. Employees frequently have to yell to be heard by each other. One day, his manager yells at him to get out of the way because something was about to fall on him.
- Julio goes to HR and complains about his manager yelling at him. Julio tells HR that he has PTSD and the yelling triggers panic attacks. How could you respond?

LEADING THE CHARGE



BEST PRACTICES

LEADING THE CHARGE



Engage in the Process

- Communicate
- Listen
- Document
- Be patient

LEADING THE CHARGE



Treat “Bad” and “Good” Employees the Same

- Engage in the interactive process
- Handle the discipline separately – but still handle it

LEADING THE CHARGE



Job Descriptions Matter

- Include all essential functions
- Include whether an employee needs to physically be in the office. Especially important for requests to telecommute, flex hours, or unpaid leave.

LEADING THE CHARGE



Do the Homework

- Don't say no until you understand the issue
- Quick decision-making can lead to bad results
- There may be a different option for the employee that isn't what the employee requested – but it works

LEADING THE CHARGE



Document!

- Document, document, document!
- There needs to be evidence of the interactive dialogue process
- If it's not documented, it didn't happen

LEADING THE CHARGE



Don't Forget Interplay with FMLA

- There is no reasonable accommodation or undue hardship analysis under the FMLA
- Make sure you read and understand the Certification of Healthcare Provider
- Use the FMLA forms in a timely fashion
- Accurately calculate time off – especially with intermittent leave

LEADING THE CHARGE



QUESTIONS?

LEADING THE **CHARGE**

